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No. 84-1271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

C. R. JOHNSON (MRS.), *et al.*,
Petitioners,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are more properly stated as follows:

1. Whether this Court's opinion in *Trans World Airlines, Inc. v. Thurston*—where TWA did not contend that age is a bona fide occupational qualification ("BFOQ") for its flight officer position—precludes all other airlines from proving that age is a BFOQ for their flight officer positions.

2. Whether an airline can establish a BFOQ defense based upon evidence that an employment policy alleged to discriminate on account of age is reasonably necessary for the safety of flight operations.

3. Whether the trial court's jury instruction on the BFOQ defense—which several times stated that American Airlines had to prove "that age is a bona fide occupational qualification . . . reasonably necessary to the essence" of American's business—properly stated the statutory BFOQ standard.

Pursuant to Rule 28.1, American's parent company is AMR Corporation and its affiliates are AMR Energy Corporation AA Training Corporation, AA Training Limited, Flagship International Inc., Skyships Inc., Skyships of Wisconsin Inc. Rainbow House Inc., Skyships Of Alabama Inc., Skyships Of Toronto, Skylogan Corp. AMR Service Corporation, AMR Capitol Corp., El Paso Terminal Corporation, and San Antonio Terminal Corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

STATUTES INVOLVED

Several statutory provisions not recited in the Petition are also involved in this case.

The Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301 *et seq.*, provides, in pertinent part:

49 U.S.C. § 1302(a)(2) (1982):

> (a) In the exercise and performance of its powers and duties under this chapter, the [Civil Aeronautics] Board shall consider the following,

among other things, as being in the public interest, and in accordance with the public convenience and necessity:

* * * *

(2) The prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to the furtherance of the highest degree of safety in air transportation. . . .

49 U.S.C. § 1421(b) (1982):

(b) In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator [of the Federal Aviation Administration] shall give full consideration to the duty upon air carriers to perform their services with the highest possible degree of safety in the public interest.

STATEMENT OF THE CASE

In their "Statement of the Case," Petitioners have recited the evidence which they sought the jury to adopt at trial, but which the jury obviously rejected. Upon consideration of all the evidence, the jury returned a special verdict in which it found that American's policy of not permitting age 60 pilots to serve as flight officers was based on a BFOQ. (Tr. 836-37; R.E. 35-38) The following is a summary of the evidence supporting the jury's special verdict.

American's principal business is the safe transportation of passengers. (Tr. 388-97) Most aircraft in American's fleet have three cockpit positions: captain, copilot, and third crew member. (Tr. 22-25, 371-83) The captain is in command of all aspects of the aircraft and its crew. The copilot is second in command and assists the captain in flying the aircraft. (Tr. 22-25, 385-87)

The third crew member is responsible for, among other things, monitoring the aircraft's fuel, electrical, hydraulic, and other systems. (Tr. 24-26) He or she also observes and participates in American's cockpit procedures employed during flight. (Tr. 367-78)

Prior to the introduction of jet aircraft in the early 1960's, American hired only flight engineers to serve as third crew members. (Tr. 618-20) Those flight engineers generally were not pilots, but were often qualified mechanics. (Tr. 54-57, 618-20) They were responsible for monitoring and sometimes repairing various systems on the aircraft. (*Id.*)

American began introducing jet aircraft into its fleet in the early 1960's. (Tr. 369-74, 620-26) Those new jet aircraft were much more complex and difficult to operate safely than propeller aircraft. (*Id.*) This increased operational complexity contributed to American's losing six jet aircraft in accidents in the early 1960's. (Tr. 370-73, 621) American also lost five other aircraft in accidents during this time, bringing its accident total to an alarming eleven aircraft in a relatively short period. (Tr. 620-22) American then determined, and it has since been reaffirmed, that pilot error is the principal cause of aircraft accidents. (Tr. 621) Because of the high number of accidents in the early 1960's, American decided to alter its pilot hiring and training methods in an attempt to achieve the highest possible degree of safety. (Tr. 373-77, 620-29, 651-52, 715)

The most dramatic step in American's effort to increase safety was its decision in 1964 to hire only pilots for all cockpit positions, instead of hiring mechanics for flight engineer positions. Since 1964, American has not hired any flight engineers. (Tr. 373-76, 651-52, 715) The new pilot-flight officers have been required to advance to copilot and, ultimately, to captain. (Tr. 371-80) American has hired its future captains to serve as flight

officers so that they would spend a training period in the flight officer position, observing all aspects of American's cockpit procedures. (Tr. 373-74, 659-60) The time spent as a flight officer observing and participating in American's cockpit procedures is a critically-important training device for future copilots and captains. (*Id.*)

As part of its policy to hire only future captains, American implemented "up or out" and "capable of progression" policies, which require pilots to train and qualify for the next highest cockpit position as called upon to do so in accordance with their seniority. (Tr. 377-79, 625-30, 657-60) If a pilot is unable to qualify in turn for the next highest pilot category, he must either transfer to a non-cockpit position or be terminated. (Tr. 378-84) Moreover, if at any time a pilot becomes disqualified or otherwise unable to maintain his current pilot status or becomes incapable of progressing to the next highest pilot category, he must either transfer to a non-cockpit position or be terminated. (*Id.*)[1] American's policies result in highly motivated and proficient pilots eventually upgrading to the command position of captain. (Tr. 378-79, 657-61) So as not to disrupt its desired crew command structure, American would not permit any captain, regardless of age, voluntarily to downbid to the flight officer position. (Tr. 220-21, 490-91, 655-56)

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[1] As stated in American's Flight Department Administrative Guide-Technical:

> There can be no such person as a permanent first officer [*i.e.*, copilot] or flight officer in American Airlines. If the company is to progress, pilots must be ready for upgrading when their services in higher capacities are required. Whenever it is determined that a pilot is incapable of progressing to the next higher job category, the individual must be transferred into some other line of work or be dismissed from the service of American Airlines.

(Def. Ex. 13, Sec. 2.04, p. 1; Tr. 383)

The most desirable result of American's pilot hiring, up or out, and capable of progression policies is that the captain, who is in charge of all aspects of the flight, is the cockpit crew member with the most seniority and cockpit experience in American's aircraft. (Tr. 378-89, 659-61) To achieve the highest degree of safety, the pilot in command must be the leader in the cockpit, and should not have his command shared in any respect with other members of the crew who have more seniority or experience than he. (Tr. 493-94, 657-61) The presence of a more senior, more experienced pilot in a lower status pilot position could result in confusion as to who is in charge of the aircraft. (Tr. 492-94, 505-11) Such confusion could be disastrous in an emergency situation, leading to catastrophic results. (*Id.*)

In addition to the up or out and capable of progression policies, American has structured its pay incentives to ensure that all pilots will bid for and occupy the highest pilot seat for which they are qualified. (Tr. 173-74, 704-05) Of course, occasional business downturns resulting in cutbacks in flights may require that the least senior pilots in one category serve in the next lowest category. (Tr. 212-16, 384-87, 702-05) The desired cockpit command structure remains intact in such situations, because the most senior pilots will serve in the highest cockpit positions, while the most junior pilots will serve in the lowest cockpit positions and sustain the accompanying cut in pay. (Tr. 387) Accordingly, the captain at all times will be the most senior and experienced pilot, and thus the undisputed leader of the crew. (Tr. 384-87, 702-05)

American's safety record since 1966 has been one of the best in the world and has far exceeded that of most U.S. air carriers. (Tr. 635) While it is not possible to attribute this impressive safety record to only one policy, it is American's opinion that no alternative policies to the current pilot hiring, up or out, and capable of pro-

gression policies would be as effective in attaining such a high degree of passenger safety. (Tr. 376-77)

Because of American's change in 1964 to hiring only future captains for its cockpit crews, two different types of employees perform the third crew member duties: professional flight engineers and pilot flight officers.[2] Flight engineer is a "career" position at American; no American flight engineer has the right or the obligation to advance to the positions of copilot and captain. (Tr. 58, 112-14) Flight officers, on the other hand, must advance in turn to the higher pilot categories and remain capable of doing so or face either transfer to a non-cockpit position or termination. (Def. Ex. 13, Sec. 2.04, p.1; Tr. 380-84)[3]

American does not allow pilots to serve as flight officers upon their disqualification from serving as captain or copilot by a Federal Air Regulation promulgated by the Federal Aviation Administration in 1960, which precludes pilots from serving in such positions upon reach-

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[2] All of American's flight engineers were hired prior to 1964, with the exception of 10 flight engineers transferred into American's staff, pursuant to the labor protective provisions of the Civil Aeronautics Board, as a result of a merger with Trans Caribbean Airways in 1971. To resolve the jurisdictional dispute between the flight engineers' and the pilots' unions concerning representation of third crew members, American entered into the "Tripartite Agreement," which provided that flight engineers would remain on a separate, closed seniority list and that flight officers would be on the pilot seniority list along with American's captains and copilots. (Tr. 56-58, 112-14)

[3] Petitioners incorrectly state that American forced them to retire at age 60. (Petition, at 4-5) American has no mandatory retirement policy for pilots reaching age 60. Instead, virtually all pilots disqualified from being captains and copilots by the Age 60 Rule choose to retire because of the lucrative pension benefits provided by American to retiring pilots. (Tr. 210-12) However, if any age 60 pilot chose to defer receipt of such pension benefits, he or she could apply and be considered for any non-cockpit position at American. (*Id.*)

ing age 60. 14 C.F.R. § 121.383(c) (the "Age 60 Rule"). American's policy provides that a pilot who is either not capable of continuing to serve or is not capable of progressing to serve as captain or copilot—for whatever reason, including the Age 60 Rule—must be transferred into some other line of work or be dismissed from the company's service. Flight engineers, on the other hand, may continue to serve in their non-pilot occupation until age 70.

American's evidence at trial demonstrated two justifications for its policy of not allowing pilots disqualified by the Age 60 Rule to serve as flight officers. First, if the senior, age 60 pilots were permitted to occupy the entry level flight officer seat, then American's system for training future captains would be severely degraded. (Tr. 207-09, 378-82, 629-34, 658-60, 703-05) American's up or out and capable of progression policies, which preclude any pilot from being a career flight officer, prevent the blocking of the flight officer "training seat." (Def. Ex. 13, Sec. 2.04, p. 1; Tr. 383, 658-61)

Second, American's evidence demonstrated that permitting ex-captains disqualified by the Age 60 Rule to occupy the flight officer seat would endanger the safety of American's flights by creating "role ambiguity" and uncertainty in the cockpit. (Tr. 215-20, 504-11, 548-68, 658-61) American's pilot hiring, up or out, and capable of progression policies result in American cockpit crews which consist of a senior, experienced captain, a less senior, less experienced copilot, and a junior flight officer. The authority of the captain, who must make all critical decisions, is reinforced by the fact that he is the oldest and most experienced crew member. (Tr. 211-12, 387-90, 504-11, 658-61) Thus, there is no doubt who is in charge, and, as is required for safe flight operations, there is only one leader in the cockpit. In order to maintain this desired crew structure, American would not

permit any captain, regardless of his age, to use his seniority to bid a flight officer's seat. (Tr. 220-21, 490-91, 655-56)

Two highly qualified experts testified that age 60 ex-captains serving as flight officers could create dangerous situations in the cockpit. (Tr. 504-11, 550-65) Dr. Lee Bolman of Harvard University testified that, in those potentially catastrophic situations when the cockpit crew faces an equipment malfunction or other emergency, it must be absolutely clear on the flight deck that the captain is in charge. (Tr. 553-58) Dr. Bolman testified that the presence of an age 60 ex-captain as flight officer could undermine the leadership role of the younger, less experienced captain. (*Id.*). Such "role ambiguity" results in confusion in the cockpit over who is in charge. (*Id.*) Dr. Bolman testified "that there have been a lot of cases in which there's been some confusion about who was supposed to do what. It's clear from [investigations of] the accidents that . . . [cockpit] confusion can be serious or fatal for an airplane." (Tr. 555)

Both Dr. Bolman and Dr. Don E. Flinn, Chairman of the Department of Psychiatry at Texas Tech University, testified regarding problems that age 60 ex-captains would have in adjusting from being the pilot-in-command to the subordinate flight officer. (Tr. 508-10, 561-62) Dr. Bolman testified that any inability of an ex-captain to adjust fully to his new, subordinate position could endanger the aircraft in an emergency situation. (Tr. 561-62) Dr. Flinn testified that as people get older, they have more difficulty (*i.e.*, "rigidity") in adjusting from a leadership to a subordinate role. (Tr. 510) Such rigidity could be dangerous in an emergency situation. (*Id.*) A further danger posed by the presence of an age 60 ex-captain as flight officer is that the younger, less experienced captain could be intimidated and, thus, be rendered an ineffective leader. (Tr. 507-10) In short, the pres-

ence of an age 60 ex-captain in the flight officer's seat would add uncertainty and confusion to the cockpit, making the performance of all cockpit crew members less predictable and less safe. (Tr. 508)

Petitioners contended at trial that American discriminated against them in violation of the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA"), by refusing to permit them to serve as flight officers past age 60. The jury determined that age was a determining factor in American's policy not to allow Petitioners to occupy or continue to occupy the flight officer position. (Tr. 836-37; R.E. 35-38) The jury also determined, after evaluating Petitioners' evidence and the evidence summarized above, that American's policies were based on a BFOQ. (*Id.*) The United States Court of Appeals for the Fifth Circuit affirmed the jury's verdict. *Johnson v. American Airlines, Inc.*, 745 F.2d 988 (5th Cir. 1984).

SUMMARY OF THE ARGUMENT

Petitioners, in their Statement of the Case, summarized their evidence to the jury and American, in the pages above, has summarized its evidence to the jury. The jury considered each side's evidence and then returned a special verdict in which it concluded that "American's policy not to allow Plaintiffs to occupy or continue to occupy the flight officer position was based on a bona fide occupational qualification." (Tr. 836; R.E. 36) A writ of certiorari is not warranted to review that special verdict, which is based on facts that are unique to this case, and which has already been reviewed and affirmed by the court of appeals below.

This Court's recent decision in *Trans World Airlines, Inc. v. Thurston*, —— U.S. ——, 105 S.Ct. 613 (1985), has no bearing on the jury's special verdict entered in this case. In *Thurston*, TWA did not contend that the

denial of its age-60 captains' requests for transfer to flight engineer positions was based on a BFOQ for the flight engineer position. Instead, TWA only contended that age less than 60 was a BFOQ for the *captain* position. American, on the other hand, contended that its policies precluding pilots' service past age 60 are based on a BFOQ for American's *flight officer* position. *Thurston*—which did not even address whether age 60 is a BFOQ for TWA's flight engineers—does not preclude American from proving that age less than 60 is a BFOQ for its flight officers.

American proved that pilots disqualified by the Age 60 Rule could not safely fill the flight officer position. The jury found the challenged policies to be reasonably necessary to safe flight operations, based upon American's evidence that such policies prevented unsafe conditions in the cockpit and enabled American to train future captains. Such evidence clearly supports a BFOQ determination, as this Court recognized in *Dothard v. Rawlinson*, 433 U.S. 321 (1977). To construe the BFOQ defense as narrowly as suggested by Petitioners would require an airline to employ persons over a certain age even where, as the jury in this case found, to do so would undermine the safety of the airline's flight operations.

Finally, the trial court properly instructed the jury on the BFOQ defense. Read as a whole, the instruction clearly provided that if the jury found that age was a determining factor in the challenged pilot policies, American had to prove that age was a BFOQ "reasonably necessary" to the safety of American's flight operations. The instruction closely followed both the statutory language of the ADEA and also the well-settled BFOQ test articulated in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).

REASONS FOR DENYING THE WRIT

I. This Court's Decision In *Thurston* Does Not Prevent An Airline From Proving That Age Is A BFOQ For Its Flight Officer Position

Petitioners contend that the Fifth Circuit opinion below is "squarely in conflict" with this Court's decision in *Trans World Airlines, Inc. v. Thurston*, —— U.S. ——, 105 S.Ct. 613 (1985). *Thurston* and this case, however, are fundamentally different. In *Thurston*, TWA "did not contend that age is a BFOQ for the position of flight engineer." 105 S.Ct. at 623, n.18. American, on the other hand, proved that age is a BFOQ for the *flight officer* position at American. Nothing in *Thurston* suggests that American or any other airline is precluded from proving to a jury that age less than 60 is a BFOQ for its flight officers.[4] The fact is that American and TWA have fundamentally different cockpit crew employment policies and methods of operation.[5] The jury determined that American's approach to maximizing pilot proficiency was reasonably necessary to safe flight operations.

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[4] This Court in *Thurston* held that TWA's pilot downbidding policy, which was very restrictive as applied to age 60 captains seeking to downbid to flight officer, but which was liberal in permitting younger captains to downbid to flight officer, constituted unlawful disparate treatment under the ADEA. That holding is inapposite to the instant case because American would preclude any captain from downbidding to flight officer and would also preclude any pilot from serving in any pilot position if, for *any* reason, he or she became incapable of progessing to the next highest pilot category.

[5] For example, unlike American, TWA has no "up or out" or "capable of progression" policies governing employment of pilots. Unlike American, TWA permits most pilots voluntarily to downbid to lower pilot categories, provided that a vacancy exists. *Thurston*, 105 S.Ct. at 619. Unlike American, TWA permits "medical downbids"; that is, captains disqualified as captains for medical reasons are allowed to "bump" less senior flight engineers. *Id.* Unlike American, TWA has an established practice of downgrading pilots for disciplinary reasons. *Id.*, at 619, n.11. TWA does not have

Petitioners suggest that this Court should grant certiorari to "assure a uniform standard in the airline industry on the age 60 flight engineer issue." (Petition, at 8) American acknowledges that a consistent *legal* standard must apply to all airlines in adopting and implementing pilot employment practices. There are many different ways, however, for an airline to implement employment practices within the scope of the consistent legal standard in order to meet its federal mandate to operate with the "highest possible degree of safety." Reasonable, justifiable differences of opinion among the airlines on the flight officer issues are not precluded by *Thurston.* Petitioners' suggestion that this Court should require all airlines to adopt identical cockpit crew policies is without merit. The BFOQ defense is a case-by-case determination, based upon the facts unique to each employer's business. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 230-31 (5th Cir. 1976).

II. The Evidence Clearly Supports The Jury's Verdict That American's Pilot Policies Are Based On A BFOQ

The focus of American's evidence at trial was that pilots disqualified by the Age 60 Rule cannot safely fill the flight officer position. Petitioners' contention that American's BFOQ was "proved by evidence not based on age or ability to perform the 'particular' [flight officer] job . . ." (Petition, at 8) totally mischaracterizes the evidence considered by the jury below.[6]

"training seat" or "crew command structure" concepts like those which the jury below held justified American's policies as a BFOQ for the flight officer position.

[6] Petitioners failed to move for a directed verdict and judgment notwithstanding the verdict. Therefore, the question on appeal is not whether there was insufficient evidence to warrant submission

The evidence presented to the jury showed (1) that age 60 ex-captains could not safely fill the *flight officer* job because, *inter alia*, their presence as flight officers would create confusion and uncertainty in the cockpit, and (2) that both ex-captain and non-captain age 60 pilots could not safely fill the flight officer job because they would impede the training of American's future captains.[7] Clearly, Congress did not intend the ADEA to invalidate an employment policy found by a jury to be reasonably necessary to safe flight operations, as in this case.

This Court has held that even if an excluded class of employees has the physical ability to perform a job, a BFOQ may be established if the employer can prove that the overall safety and efficiency of the employer's operation would be jeopardized by permitting such employees to serve in the subject position. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). In *Dothard*, this Court's determination that the employer's policy of excluding women as prison guards constituted a BFOQ was not based on

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of the BFOQ defense to the jury, but whether there was an absolute absence of any evidence capable of supporting the jury's verdict. *Bohrer v. Hanes Corp.*, 715 F.2d 213, 216 (5th Cir. 1983); *Coughlin v. Capitol Cement Co.*, 571 F.2d 290 (5th Cir. 1978). The Fifth Circuit properly held that American's evidence supported the jury verdict.

[7] Petitioners incorrectly allege that American's BFOQ evidence had nothing to do with Petitioners' incapacity due to the aging process. Dr. Flinn testified that age 60 ex-captains could be unsafe as flight officers because "people do become rigid as they get older and I think that it's entirely possible that some senior captains . . . [permitted to fly] as flight engineers would be less able [than younger persons] to . . . slip into the role of a subordinate position." (Tr. 510) Such rigidity brought on by the aging process could create an unsafe cockpit environment. (*Id.*) Even assuming, *arguendo*, that BFOQ evidence had to relate *solely* to the effects of the aging process, Dr. Flinn's expert testimony clearly supports the jury verdict.

any evidence of the physical inability of females to perform the tasks required of prison guards. Instead, this Court relied solely on the fact that the mere presence of a female guard working in a male prison, regardless of her competence, could create an unsafe situation. The Court stated as follows:

> The essence of a correctional counselor's job is to maintain prison security. A woman's relative ability to maintain order in a male, maximum security, unclassified penitentiary of the type Alabama now runs could be directly influenced by her womanhood.
>
> * * * *
>
> The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and other security personnel. The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.

Dothard, 433 U.S. at 335-36.

The Court made it clear in *Dothard* that in evaluating evidence pertaining to a BFOQ defense, the finder of fact may consider more than a person's physical ability to perform the job, and may consider the employee's effect on the safety of the employer's overall operation. *Accord*, *EEOC v. University of Texas Health Science Center*, 710 F.2d 1091 (5th Cir. 1983); *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). In this case, American's evidence showed that to retain pilots disqualified by the Age 60 Rule would both diminish the training of future captains and create unpredictable, unsafe conditions in the cockpit. As held in *Dothard*, such evidence clearly supports a BFOQ.

III. The Trial Court's Jury Instruction Closely Followed The Statutory Language Of The ADEA And The Well-Settled Case Law For The BFOQ Defense

Petitioners allege that the jury instruction was defective because it failed to "tie the need for the limitation [American's policy] to the age of the individuals affected" (Petition, at 11), and also because it required American only to show that its policies have a "reasonable basis" rather than to show that they are "reasonably necessary." (*Id.*, at 12)[8] However, Petitioners failed to object to the instructions on these grounds at trial, and are thus precluded from raising these issues in the Petition.

In any event, the trial court did relate American's claimed BFOQ directly to age on three separate occasions:

> It is not unlawful, however, for an employer to take any action otherwise prohibited by the Act when age is a bona fide occupational qualification . . .

(Tr. 787; p. 6a hereto)

> . . . [If you find that age was a determining factor,] then you must consider American's affirmative defense that age is a bona fide occupational qualification.

(Tr. 789; p. 7a)

> Should you find that age was a determining factor . . . and that age was not a [BFOQ] . . .

(Tr. 790; p. 8a)[9] Moreover, the trial court did, on four separate occasions, instruct the jury that American had

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[8] The Petition, at App. 24, sets forth only a portion of the trial court's charge to the jury regarding the ADEA and the BFOQ defense. The trial court's entire jury charge is set forth at 1a-8a hereto.

[9] Petitioners also contend that the BFOQ instruction was not sufficiently tied to age because the trial court allowed the jury to

to prove that the BFOQ was "reasonably necessary" to the essence of American's business.[10]

Read in its entirety and considered as a whole, the trial court's BFOQ instruction closely followed the statutory language of the ADEA. It also followed the language of the well-accepted guidelines enunciated in

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consider whether allowing Petitioners to serve as flight officers would be unsafe due to their effect on other American employees and on American's flight operations as a whole. (Petition, at 11) A BFOQ, however, need not be based exclusively on evidence of a class of persons' incapacity due to the aging process. As explained at pages 13-14, *supra*, a BFOQ can also be based upon the effect that employment of such class of persons would have on the performance of other employees and on the overall safety of the employer's operations. *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

[10] The pertinent portions of the trial court's charge are as follows:

> American further contends . . . it [American's pilot policies are] . . . justified as a bona fide occupational qualification *reasonably necessary* to the essence of American's business, which is safety.

(emphasis supplied) (Tr. 786; p. 5a)

> It is not unlawful, however, for an employer to take any action otherwise prohibited by the Act when age is a bona fide occupational qualification *reasonably necessary* for the normal operation of the particular business.

(emphasis supplied) (Tr. 787; p. 6a)

> One of the requirements for a bona fide occupational qualification is that it is *reasonably necessary* to the essence, or normal operation, of the employer's business . . .

(emphasis supplied) (Tr. 789; p. 7a)

> American may show its policy is *reasonably necessary* to safety and thus is a bona fide occupational qualification . . .

(emphasis supplied) (Tr. 789; p. 7a)

Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224 (5th Cir. 1976).[11]

Finally, Petitioners contend that because this Court is currently reviewing a BFOQ jury instruction in *Western Airlines, Inc. v. Criswell*, (No. 83-1545), the Court should grant certiorari to review the propriety of the instruction in this case. However, the resolution of the legal issues presented in *Criswell* will not affect the outcome of this case. The jury instructions are altogether different. The trial court in this case patterned its charge after *Tamiami*; the trial court in *Criswell* clearly did not. Accordingly, the legal issues in *Criswell* are far different from those raised in the Petition. The legal issues in *Criswell* are whether a BFOQ instruction is defective where, *inter alia*, it fails to accord discretion to the airline in implementing employment policies that promote passenger safety and fails to allow an airline to err, if at all, on the side of passenger safety in resolving bona fide disputes among medical experts concerning safety-related employment policies. The legal issues raised in the Petition are whether the BFOQ was sufficiently tied to age and whether the trial court re-

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[11] Petitioners acknowledge that *Tamiami* sets forth the generally accepted guidelines for the BFOQ defense. (Petition, at 11) The *Tamiami* test for evaluating BFOQ claims has been adopted by virtually every United States Court of Appeals that has considered the scope of the BFOQ exception. *See, e.g., Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir. 1984); *Airline Pilots Association v. Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983), *aff'd in part, rev'd in part sub nom. Trans World Airlines, Inc. v. Thurston*, —— U.S. ——, 105 S.Ct. 613 (1985); *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977); *EEOC v. University of Texas Health Science Center*, 710 F.2d 1091 (5th Cir. 1983); *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982); *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983); *Hoefelman v. Conservation Comm. of Missouri Dept. of Conservation*, 718 F.2d 281 (8th Cir. 1983); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980); *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982).

quired American to demonstrate that its policies were "reasonably necessary." Because the jury charges are fundamentally different, and because entirely different issues are presented for review, the outcome of *Criswell* will have no bearing on this case.

Moreover, even if the legal issues were similar in *Criswell* and this case, the resolution of *Criswell* will not affect the outcome of this case, because the facts are entirely different.[12] The jury in this case, unlike in *Criswell*, found that the challenged pilot policies were reasonably necessary to the safety of the airline's flight operations. The jury's special verdict on that ultimate factual issue forecloses any serious attack on the judgment in this case.

CONCLUSION

The judgment below is based on a jury's determination by special verdict that American's policies are based on a BFOQ reasonably necessary to the safety of American's flight operations. That special verdict is based on a factual record that is unique to American Airlines, because no two airlines operate alike.

Petitioners do not challenge the jury's determination that American's policies enhance the safety of its operations. Instead, Petitioners urge this Court to reinterpret the BFOQ standard so as to require airlines to employ policies that concededly diminish flight safety.

Read as a whole, the trial court's jury instructions closely parallel the statutory language of the ADEA and

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[12] For example, Western precludes anyone from serving as a flight engineer past age 60. Western contended at trial that the same medical justifications underlying the Age 60 Rule's disqualification of age 60 pilots from serving as captains and copilots applied with equal force to disqualify any age 60 person from serving as a flight engineer. American made no such contention at trial and, in fact, permits professional flight engineers to serve until age 70.

the BFOQ precedents of the other circuits and of this Court.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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TRIAL COURT'S JURY INSTRUCTION

THE COURT: Members of the Jury: Now that you have heard all of the evidence and the argument of Counsel, it now becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as Jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit Jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

The case should be considered and decided by you as as action between persons of equal standing in the community, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as is a private individual. The law is no respecter

of persons, and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

When a corporation is involved, of course, it may act only through natural persons as its agents or employees; and, in general, any agent or employee of a corporation may bind the corporation by his acts and declarations made while acting within the scope of his authority delegated to him by the corporation, or within the scope of his duties as an employee of the corporation.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given his testimony. In weighing the testimony of a witness you should consider his relationship to the Plaintiffs or to the Defendant; his interest, if any, in the outcome of the case; his manner of testifying, his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the Jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may

think it deserves. If you should decide that the opinion of experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, than you may disregard the opinion entirely.

The burden is on the Plaintiff in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence". A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

The same burden of proof applies to a Defendant's affirmative defense. If you find that a Plaintiff has established every essential element of his claim by a preponderance of the evidence, the burden is then on Defendant to prove every essential element of its affirmative defense by a preponderance of the evidence.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the Jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential element of Plaintiffs' claim by a preponderance of the evidence, the Jury should find for the Defendant as to the claim.

Similarly, if the proof should fail to establish any essential element of Defendant's affirmative defense by a preponderance of the evidence, the Jury should find for Plaintiffs.

PLAINTIFFS' CONTENTIONS

Plaintiffs in this action are twenty-two cockpit crew members who are or were employed by the Defendant

American Airlines. Plaintiffs contend that American has or will discriminate against them on the basis of age by requiring them to retire at age sixty and by refusing to allow them to work as flight officers in the flight engineer position on American's airplanes. Plaintiffs contend that the action of American violated the Age Discrimination in Employment Act (the ADEA).

Plaintiffs contend that the motivating factor which made a difference in American's decision against them was that they had reached age sixty. Plaintiffs contend that American has not proved that Plaintiffs cannot safely perform the job of flight officer, and has not proved that it is impossible or highly impractical to assess their performance as flight officers. Finally, Plaintiffs contend that American has not proved that the plaintiffs would interfere with the progression of American's younger pilots.

DEFENDANT'S CONTENTIONS

American contends that it did not discriminate against Plaintiffs on the basis of their age. American maintains that age was not a determining factor in that Plaintiffs after reaching sixty years of age were disqualified from serving as flight officers because they were no longer capable of progressing to the position of Captain. American further contends that even if age were a determining factor in its policy, it is not unlawful under the ADEA since it is justified as a bona fide occupational qualification reasonably necessary to the essence of American's business, which is safety. First, American contends that allowing former pilots to occupy the flight officer position would deny American the use of that position as an entry level training position in the cockpit line of progression. American maintains that this would interfere with the training and development of future Captains, and would make American's operation less safe now and in the future. Second, American contends that if its former Captains began serving as flight officers,

this reversal of authority roles would create an unsafe condition in the cockpit. American maintains that having the most senior, most experienced person in the subordinate flight officer position would create an unacceptable risk that this person would have an adverse effect on the safe performance of the cockpit crew.

Now I will discuss the Age Discrimination in Employment Act.

Under Federal law, it is unlawful for an employer to discriminate against any employee because of that employee's age, when the employee's age is between forty and seventy. Specifically, it is unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

It is not unlawful, however, for an employer to take any action otherwise prohibited by the Act when age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.

Congress has declared that the purpose of the Age Discrimination in Employment Act is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

Now, the FAA age 60 rule.

Testimony has been given in this case about the FAA or Federal Aviation Administration's Age 60 Rule.

You are instructed that the FAA's Age 60 Rule only applies to Captains and co-pilots.

DETERMINING FACTOR

The burden of proof is on the Plaintiffs to show discriminatory treatment on the basis of age by a preponderance of the evidence. Plaintiffs' claims of age discrimination are based on American's decision not to allow Plaintiffs to occupy the flight officer position upon reaching age 60. You must determine whether, taking the evidence as a whole, age was a determining factor in this action. You need not find that age was the only reason. If more than one factor was involved, Plaintiffs are still entitled to recover if one of the factors was their age and it made a difference in American's decision. It is sufficient if the Plaintiffs' age, in combination with some other reason acting at the same time, formed the basis for American's action.

Now, Bona Fide Occupational Qualification. If you find that Plaintiffs have proven by a preponderance of the evidence that their inability to continue in or transfer to the flight officer position was the result of policies in which age was a determining factor, then you must consider American's affirmative defense that age is a bona fide occupational qualification. One of the requirements for a bona fide occupational qualification is that it is reasonably necessary to the essence, or normal operation, of the employer's business, which in this case is the safe transportation of passengers. American need only show that it has a reasonable basis for its assessment of the safety risk involved.

American may show its policy is reasonably necessary to safety and is thus a bona fide occupational qualification in either one of two ways: American may show that there is a factual basis for believing that all or substantially all persons excluded by its policy would be unable to perform safely and efficiently as flight officers for

American after having lost their ability to serve as pilots; or American may show that it is impossible or impractical to determine on an individual basis which ones can safely perform, thereby justifying a reasonable, general rule. In determining whether American has a reasonable basis for believing that Plaintiffs would be unable to safely perform as flight officers, you may consider more than simply the individual Plaintiff's ability to perform the tasks of the flight officer job. You may also consider the effect that allowing Plaintiffs to serve as flight officers would have on the safety of American's operation because of its effect on its other employees, crew command structure, training program, or any other reason relating to safety.

WILLFUL VIOLATION

Should you find that age was a determining factor in American's treatment of Plaintiffs and that age was not a bona fide occupational qualification, you will be asked to determine whether American's violation of the ADEA was willful. The ADEA provides additional penalties when a violation is found to be willful. To prove willfulness, Plaintiffs need only show that American was aware that its actions were governed by the ADEA. Plaintiffs need not show that American acted maliciously or in bad faith.